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BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application for the Transfer of Woods Creek Dam)	
(Dooley Dam) on Woods Creek, Town of Fern, Florence)	3-LM-95-0391
County, Wisconsin to Kevin and Lori Romitti Trust)	3-LM-95-0397
and, subsequently, to Wisconsin Electric Power Company)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PERMIT

This application consists of the transfer of ownership of the Woods Creek Dam (Dooley Dam) on Woods Creek to the Kevin and Lori Romitti Trust, and subsequent transfer from the Kevin and Lori Romitti Trust to the Wisconsin Electric Power Company. The Department of Natural Resources issued a Notice of Proposed Transfer of Ownership of a Dam which stated that unless written objection was made within thirty days after publication, the Department might issue a decision on the permit without a hearing. Timely objections were received by the Department.

On November 1, 1995, the Department filed a Request for Hearing with the Division of Hearings and Appeals. Pursuant to due notice a hearing was held on January 10, 1996 in Florence, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. The parties filed written arguments after the hearing. The last submission was received on February 15, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Electric Power Company, by

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3-LM-95-0391

3-LM-95-0397

Page 2

Wisconsin Department of Natural Resources, by

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Town of Fern, by

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Applicable Law

Section 31.02(5), Stats., provides:

The department shall give written notice to the public service commission of any hearing under this chapter involving public utilities.

Section 31.14, Stats., provides in relevant part:

(1) It is the policy of this section to preserve public rights in navigable waters, including those created by dams, and to provide a means of maintaining dams and the developments which have been made adjacent to the flowage of such dams.

(2) Except as provided in sub. (3), a permit shall not be granted under s. 31.06, 31.08 or 31.13:

(a) Unless the applicant furnishes to the department proof of ability to operate and maintain the dam in good condition, either by the creation of a special assessment district under ss. 31.38 and 66.60, or by any other means which in the department's judgment will give reasonable assurance that the dam will be maintained for a reasonable period of time not less than 10 years; or

(b) If a majority of the municipalities in which 51% or more of the dam or flowage is or will be located files with the department, prior to the granting of the permit, their objections to the granting of such permit in the form of resolutions duly adopted by the governing bodies of such municipalities.

(3) Subsection (2) does not apply if the applicant complies with each of the following requirements:

(a) Furnishes proof satisfactory to the department that the applicant owns or has an enforceable option to purchase all the land which is or will be flowed by the impoundment, together with the shoreline and an immediately adjacent strip of land at least 60 feet in width, but the department may in a particular case permit a narrower strip where the 60-foot minimum is impractical and may, in furtherance of the policy stated in sub. (1), require ownership of a wider strip.

(b) Files with the department a writing in such form as the department requires in which the applicant agrees that following the initial filling of the proposed pond the applicant will not convey the dam to another without first obtaining department approval. The department may require from an applicant who does not have the power of eminent domain a bond or other reasonable assurances that the applicant will adhere to such agreement.

(c) Furnishes proof satisfactory to the department that the applicant has dedicated or will dedicate a parcel of land for public access to the impounded waters.

(4) No person may assume ownership of a dam after October 21, 1961, or the ownership of that specific piece of land on which a dam is physically located after April 27, 1982, without first complying with sub. (2) or (3). The transfer of the ownership of a dam or the ownership of a specific piece of land on which a dam is physically located made without complying with sub. (2) or (3) is void unless a permit to abandon the dam was granted under s. 31.185 or unless the transfer occurred by operation of law. Every person who accepts ownership by operation of law is subject to this chapter.

Section 31.185, Stats., provides in relevant part:

Permits to abandon dams. (1) No owner of any dam may abandon or remove or alter the dam without first obtaining a permit from the department. No person may transfer ownership of a dam or the ownership of the specific piece of land on which a dam is physically located without first obtaining a permit from the department.

(2) An application for a permit to abandon, remove or alter a dam or an application for a permit to transfer ownership of a dam or the ownership of a specific piece of land on which a dam is physically located shall be made to the department upon forms prescribed by it and shall contain the owner's name and address, a brief description of the dam and its location and other information as the department requires for the purpose of enabling it to act on the application.

(3) Section 31.06 governs procedure upon all applications hereunder.

(5) As a prerequisite to the granting of a permit under this section, the department may require the applicant to comply with such conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health and property.

Section 710.11, Stats., provides:

Transfer of land where dam exists. A person may not accept the transfer of the ownership of a specific piece of land on which a dam is physically located unless the person complies with s. 31.14 (4).

FINDINGS OF FACT

1. A permit to construct, operate and maintain a dam was issued to H. H. Dooley by the Public Service Commission of Wisconsin (PSC) on July 1, 1946, in Docket No. 2-WP-656. The permitted dam was constructed on Woods Creek in Florence County. The legal description of the dam site is the NE 1/4 of the SW 1/4 of Section 28, Township 39 North, Range 17 East in the Town of Fern, Florence County, Wisconsin. The Woods Creek Dam has created an impoundment which currently is approximately fifteen acres in size.

2. The United States brought a foreclosure action against Michael Dooley, the owner of record of the land on which Woods Creek Dam is located. On May 11, 1995, a foreclosure sale was conducted. The parcel on which the dam is located was purchased by Kevin and Lori Romitti (Romittis). A Marshall's Deed transferring the property to Kevin and Lori Romitti, as trustees of the Kevin and Lori Romitti Trust (Romitti Trust), was entered on June 14, 1995.

3. Kevin Romitti filed a "Dam Ownership Transfer Application" with the Department of Natural Resources (Department) seeking a permit to transfer ownership of the Woods Creek Dam to himself. The application was signed by Kevin Romitti on May 24, 1995, and was received by the Department on June 13, 1995. The Romittis have not complied with the provisions of §31.14(2) or (3), Stats.

4. On May 31, 1995, the Wisconsin Electric Power Company (WEPCO) executed an offer to purchase the property on which the dam is located from the Romittis. The offer is contingent upon Department approval of the transfer of ownership of the dam.

5. On June 27, 1995, WEPCO filed a "Dam Ownership Transfer Application" with the Department. The application sought a permit to transfer ownership of the Woods

Creek Dam from the "Kevin and Lori Romitti Trust" to WEPCO. The application was signed by Kevin Romitti on June 14, 1995 and by a representative of WEPCO on June 15, 1995.

6. By Warranty Deed dated June 23, 1995, the Romitti Trust conveyed the property south of the impoundment created by the Woods Creek Dam to St. John Real Estate Company.

7. WEPCO has offered to purchase from the Romittis or has an option to purchase all the land which is flowed by the impoundment of the Woods Creek Dam and an immediately adjacent strip at least sixty feet in width, has filed with the Department a writing agreeing that it will not convey the dam to another without first obtaining Department approval, and has furnished proof satisfactory to the Department that it will dedicate a parcel of land for public access to the impoundment.

8. The Town of Fern filed a resolution seeking a hearing on the transfer of ownership of the Woods Creek Dam and opposing abandonment of the dam.

9. The Woods Creek Dam does not generate any hydroelectric or water power.

10. The applicants and the Department have complied with all procedural requirements of §§31.06 and 31.185, Stats.

DISCUSSION

The objectors assert two procedural flaws to the transfer of the Woods Creek Dam. The first alleged flaw is that §31.02(5), Stats., requires notice of the hearing to the Public Service Commission. The statute only requires notice to the PSC when a public utility is involved. In the instant case the Wood Creek Dam provides no hydro-electric or water power. Therefore, no public utilities are involved and no notice to the PSC is required.

The second procedural error alleged by the objectors is that a combined hearing cannot be held for a two stage transfer. The objectors assert that a lawful transfer of the dam must be made first to the Romitti Trust and a subsequent proceeding must be scheduled to consider the transfer from the Romitti Trust to WEPCO. The two stage transfer may be technically flawed but it is not unprecedented and does comply with the spirit and intent of the dam transfer statute.

The transfer of the dam from the United States was done by court order after a foreclosure sale. This is by operation of law and satisfies requirements of §31.14, Stats. However, §710 11, Stats., prohibits any person from accepting a transfer of the ownership of a piece of land in which a dam is located unless a person complies with §34.14(4), Stats.

Section 31.14(4), Stats., states that no person may assume ownership of a dam without first complying with §§31.14(2) or (3), Stats. The Romitti Trust did not comply with §§31.14(2) or (3), Stats. The transfer to the Romitti Trust is not valid.

However, the intent of the provisions of Ch. 31, Stats., is to ensure that dams are owned and maintained by financially responsible entities. The status of the dam prior to its acquisition by the Romitti Trust was in limbo. The Romitti Trust is not a financially responsible entity for owning a dam; however, it was never the intention of Kevin and Lori Romitti to own the dam. From the outset, it was their intention to divide the parcel and sell the dam to a financially responsible entity. This was the purpose of accepting the offer of purchase from WEPCO. WEPCO is a financially responsible entity for owning and maintaining the Woods Creek Dam.

In hindsight, it could be said that the Romitti Trust should never have been allowed to purchase the parcel from the United States. However, this transfer was accomplished and now the public interest is best served and the requirements of Ch. 31, Stats., are met by the transfer of the dam to WEPCO. It should also be noted that two step transfers such as this have occurred in the past. *See e.g. The Application of the Tomahawk Power Company for Approval of the Sale of King's Dam on the Wisconsin River above Tomahawk to E. J. Grassman and the Realty Transfer Company if Such Approval is Needed*, Docket No. 2-WP-1650 -- August 2, 1962, Volume 47, PSCW Reports, page 528-29.

Requiring the Romitti Trust to satisfy the requirement of Ch. 31, Stats., prior to considering its application to transfer the dam to WEPCO unnecessarily leaves the status of the dam in limbo indefinitely. Such uncertainty regarding the status of the dam is detrimental to the public interest and any time spent evaluating that transfer would constitute a waste of administrative resources.

The objector also raises questions regarding the lawfulness of the transactions between the Romittis and WEPCO because some documents were signed only by Kevin Romitti. These issues are beyond the scope of this hearing. If the transfer documents executed between the Romittis and WEPCO are in any way defective or deficient, these matters will need to be resolved prior to the transfer of ownership.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals, by its Administrative Law Judge, has authority under §§31.06 and 227.43((1)(b), Stats., and in accordance with the foregoing Findings of Fact to issue a permit for a transfer of ownership of the Woods Creek Dam from the United States to the Kevin and Lori Romitti Trust and thereafter for a second transfer

from the Kevin and Lori Romitti Trust to the Wisconsin Electric Power Company subject to the conditions set forth above.

2. The Wisconsin Electric Power Company has complied with the requirements of §31.14(3), Stats.

3. Pursuant to §NR 150.03(8)(f)7.e, Wis Adm. Code, the proposed transfer is a type IV action. Type IV actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND HEREBY DOES ISSUE AND IS GRANTED a permit pursuant to §31.185, Stats., for a transfer of ownership of the Woods Creek Dam from the United States to the Kevin and Lori Romitti Trust and thereafter for a second transfer from the Kevin and Lori Romitti Trust to the Wisconsin Electric Power Company. This permit is contingent upon the following: transfer documents executed by the Romittis and WEPCO being lawful and complete; WEPCO exercising its option to purchase all the land which is flowed by the impoundment of the Woods Creek Dam and an immediately adjacent strip at least sixty feet in width and; WEPCO dedicating a parcel of land for public access to the impoundment.

Dated at Madison, Wisconsin on March 15, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By Mark J. Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.